

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**  
**TEMEKE HIGH COURT SUB – REGISTRY**  
**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**CONSOLIDATED PC CIVIL APPEAL NO. 64 AND 65 OF 2022**

*(Arising from the decision of District Court of Temeke at One Stop Judicial Centre in Civil Appeal No. 41 of 2022 before Hon. J.C Msafiri- PRM, Original Matrimonial Cause No. 8/2021 of Kawe Primary Court before Hon. Tamambele – RM)*

**ZAKIA MUSSA ..... APPELLANT**

**VERSUS**

**YUSUPH AIZIDI MTORO ..... RESPONDENT**

**JUDGEMENT**

**24/7/2023 & 31/7/2023**

**M. MNYUKWA, J.**

Parties in this marriage contracted their marriage according to Islamic rites on 19<sup>th</sup> September 2005. They were blessed with three issues in their marriage relationship. They were also acquired three houses at Chasimba, Mapinga and Zinga kwa Mtoro. It was the appellant who petitioned for a decree of divorce at Kawe primary court on the reason that the respondent was not taking care of him and she was not visiting him when he was sick. That complaint was denied by the respondent who claimed the appellant to have left the matrimonial home and failed to provide maintenance for family.



After hearing both parties, the trial court dissolved the marriage by issuing a decree of divorce, gave an order on the equal division of matrimonial properties and also gave an order for the appellant to maintain the issues of marriage at the tune of Tsh 150,000/- per month.

It is on record that appellant was dissatisfied with the decision of the trial court on division of matrimonial properties and an order for maintenance which required him to pay monthly maintenance at the tune of Tsh. 150,000/=. He then appealed to the district court of Temeke at one stop judicial centre which varied the orders of the trial court by dividing a house at Boko Chasimba and Boko Chama to Yusuph Azidi Mtoro while a house at Mapinga was given to Zakia Musa. The district court also ordered Yusuph Azidi Mtoro to pay monthly maintenance at a tune of 225,000/= and arrears thereto at the tune of 3,600,000/=. The above decision provoked the parties who both appealed against the same in this court. Records shows that the appellant filed her appeal on 29/9/2022 while respondent cross appealed on 13/10/2022.

At the hearing, the appellant appeared in person while respondent was represented by Ms. Jackline Kurwa learned advocate. This appeal was consolidated and argued by way of filing written submissions upon a prayer by the parties. The case was scheduled for mention on 4/7/2023 to ascertain if the parties have filed their submissions. It appeared that

appellant did neither file her submission in chief in respect of her appeal (Pc Civil Appeal No.64/2022) nor serve the respondent, but she filed her reply submission in relation to PC Civil Appeal No. 65/2022 which was filed by the appellant and the same was crafted by Women's Legal Aid Centre (WLAC)

Therefore, this court decided to extend time for the appellant to file her submission in chief in respect of the appeal filed by her and serve the respondent but still she did not file it till today. It is therefore my belief that appellant, Zakia Mussa @ Zakia Aizidi Mtoro lost interest in prosecuting her appeal, for that matter this court shall determine PC Civil Appeal No. 65 of 2022 of which the appellant herein is the respondent and vice versa. And, to put the record clear this appeal in this court is the second appeal as far as the PC Civil Appeal No. 65/2022 is concerned.

The Appellant (*respondent herein*) filed four grounds of appeal as hereunder reproduced;

- 1. The learned trial magistrate erred in law and fact ordering distribution of matrimonial property for house located at Boko Chama and Zinga kwa Mtoro while ordering the same houses to be referred to land court.*
- 2. The learned trial magistrate erred in law and fact for failure to evaluate evidence in record and ended up condemning the appellant to pay maintenance for three issues of marriage without considering*



*the evidence on record that appellant stays with one issue of marriage.*

- 3. The trial magistrate erred in law and in fact for condemning the appellant to pay Tsh 3,600,000/= as arrears for maintenance without affording him the right to be heard and address the issue before the court.*
- 4. The learned trial magistrate erred in law and fact in ordering the appellant to pay maintenance of Tsh. 75000/= for each child to the respondent without first considering the issue of custody of the children.*

In supporting the appeal, the learned advocate argued on ground one of appeal that, the learned resident magistrate erred in law and fact in distributing the matrimonial houses located at Boko Chama and Zinga kwa Mtoro and at the same time ordering them to be referred to the land tribunal for determination of ownership. The learned counsel contended that there is no conflict of ownership of the said properties between parties rather she said, his client, Yusufu Azidi Mtoro is accepting the distribution of the said house in order for litigation to come to an end.

As for ground two, three and four, the learned counsel submitted that, the first appellate court erred in ordering Mr. Yusufu Azidi Mtoro to pay maintenance at the tune of Tsh 225,000/= monthly without considering that respondent is living with one issue and his source of income. He stated further that, the lower court failed to determine custody of their



children, she said that the 1<sup>st</sup> appellate court did not state as to whom the children should stay with.

As for maintenance arrears, the learned advocate contended that, the 1<sup>st</sup> appellate court was wrong in ordering the same since he was not afforded right to be heard. He claimed that since the court raised the issue of arrears *suo motto* he ought to have been given a chance to address the court on the same. Thus, it was his argument that the principles of natural justice was not complied with. He prayed for the appeal to be allowed by setting aside judgment and decree of the lower courts.

Disputed by the respondent, the learned advocate argued on ground one that the appellant misconceived the judgement of the 1<sup>st</sup> appellate court. She said, the part which the court said about to refer the matter to the land tribunal is an *obiter dictum*. The learned advocate argued that the court never intended to make the parties homeless.

On ground two, three and four the learned counsel submitted that, the 1<sup>st</sup> appellate court was right to order maintenance at the tune of 75,000/= for each child per month. She further submitted that, since the appellant stays with one child, he should pay maintenance arrears for the remaining children.



She argued that, the appellant has to pay arrears as ordered by the court. She then prayed for the appeal to be dismissed with costs.

Having gone through the submissions of the parties and court records. I have to be clear that this is the second appeal as earlier on stated. Therefore, I am bound not to interfere with the concurrent findings of the two courts below unless they reached to the same based on the misapprehension of evidence and applied wrongly the principles of law.

Thus, the main issue for consideration and determination is whether the appeal is merited.

I shall start with the first ground of appeal, whereas second, third and fourth grounds will be determined altogether. As for ground one, the appellant is faulting the 1<sup>st</sup> Appellate court, findings for referring the parties to the land tribunal. I agree with the learned counsel because I did not see any dispute on the said properties for the parties to be referred to the tribunal. I say so since the Law of Marriage Act, **[Cap 29 R.E 2019]** is very clear under the provision of section 114 as to what amounts to matrimonial properties or assets.

The law states clearly that all properties which were acquired by parties during the subsistence of the marriage or acquired by one spouse but substantially developed by both spouses by their joint effort are said to





be matrimonial properties/assets. So, as far as this case is concerned the lower courts ought to have considered the evidence of the parties on the acquisition of the said properties and decide on the distribution.

However, the appellant in his submission in chief conceded with the distribution of the 1<sup>st</sup> appellate court which makes my work easier. Therefore, this ground is partly allowed. The distribution of the matrimonial houses to the parties by the 1<sup>st</sup> appellate court is upheld.

For the second, third and fourth grounds, the issue for determination is whether maintenance and arrears were properly awarded. Starting with an order for maintenance where the 1<sup>st</sup> appellate court ordered respondent to pay monthly maintenance of Tsh 225,000/= . Advocate for the respondent argued that the same was wrongly awarded, I am in agreement with the learned counsel because the court did not ascertain first the financial status and source of income of the respondent before giving the order. It is apparent in the record that there was no evidence of the same for the court to order payment of Tshs. 225,000/= monthly. The Law of the Child Act, **[Cap 13 R.E 2019]** under the provision of section 44 provides for factors to be considered by the court when making an order for maintenance. For easy reference the same reads;

***A court shall consider the following matters  
when making a maintenance order-***



***(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;***

***(b) any impairment of the earning capacity of the person with a duty to maintain the child;***

***(c) the financial responsibility of the person with respect to the maintenance of other children;***

***(d) the cost of living in the area where the child is resident; and***

***(e) the rights of the child under this Act***

It is from the foregoing provision I am convinced that the first appellate court did not comply with the law by failure to enquire on the financial ability of the respondent if he can be able to pay the amount of Tsh. 225,000/= monthly. It has to be understood that the rationale for an order of maintenance is not to punish, intimidate or extort the person paying it rather to facilitate the children welfare.

For the reason stated above, an order for maintenance was improperly issued, it is hereby quashed and set aside. Parties are at liberty to file fresh application for the same.

Also, the lower courts did not decide on the custody of the children which was inappropriate. The record does not show who has custody of the children. Since respondent insisted in his submission that he stays with



one child. I assume the remaining ones are with the appellant. For that matter let the status quo as far as the custody of the children is concerned be maintained until the issue of maintenance is determined.

Regarding arrears of Tshs. 3, 600,000/= which the first appellate court ordered the respondent to pay, I respectfully think the same was erroneous granted due to the fact that, the learned principal resident magistrate failed to show when did the respondent defaulted in maintaining his children. But the most important thing was if the appellant prayed for the same in her pleadings.

It is settled that parties are bound by their pleadings as for this case at hand, it is not in records that appellant prayed for maintenance arrears. Therefore, it was inappropriate for the court to award relief not prayed for by the parties unless if awarding the same was inevitable. And therefore, it is the duty of the court to have afforded a party against which the order was made a right to defend himself.

In the case of **Salehe Surur vs Tanzania Scouts Association**, Land Appeal No. 80 of 2018, High Court, Land Division, Dar es Salaam (unreported) my learned Sister S. Maghimbi, J had this to say;

*It is trite law that court cannot grant any relief which was not claimed by the parties, and the party against*

*whom the relief is sought should be given an opportunity to defend himself*

It follows therefore that, an order for maintenance arrears is hereby quashed and set aside. This appeal is partly allowed to the extent explained above. Since this appeal arises from matrimonial cause I make no orders as to costs.

Right of appeal explained to the parties.



  
**M.MNYUKWA**  
**JUDGE**  
**24/7/2023**

**Court:** Judgment delivered on 31<sup>st</sup> July 2023 in the presence of the respondent's counsel and appellant in person.

  
**M.MNYUKWA**  
**JUDGE**  
**31/7/2023**